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"A Comprehensive Water and Related Land Resources Plan for the State of Montana"

Montana Water Laws: A Resume'

Inventory Series Report No. 5

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"A Comprehensive Water and Related Land Resources Plan for the State of Montana"

INVENTORY SERIES REPORT No. 5

MONTANA WATER LAWS: A RESUME'

NOVEMBER 1968

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FOREWORD

This publication, prepared by the Montana Water Resources Board, is the fifth in a statewide water planning series which the Board will publish utilizing funds provided by Montana's 1967 Legislature together with funds obtained from the Federal Water Resources Council under Public Law 89-80. This Resume' of Montana Water Laws contains only a summary of the more important Laws governing our State's water. For complete detail and accuracy of all laws concerning water, the Revised Codes of Montana 1947 should be consulted.

This publication will serve as an aid to all those interested in water and related land resources development within Montana.

The data contained in the Water Resources Board's Inventory series will lay the foundation necessary to the preparation of a statewide comprehensive water plan.

EVERETT V. DARLINTON
Director
Montana Water Resources Board

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Montana Water Laws: A Resume'

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MONTANA WATER LAWS:
A RESUME'

The Public Policy Of The State Is To Promote The Conservation, Development, And Beneficial Use Of The State's Water Resources To Secure Maximum Economic And Social Prosperity For Its Citizens.

Montana Water Resources Act of 1967

BASIC WATER LAWS OF MONTANA

Appropriation Doctrine Recognized

The basic water law recognized in Montana is the prior appropriation doctrine. This doctrine is a "time-use" doctrine in which the concept of "first in time, first in right" is the principal criteria for determining or recognizing the relative status of alleged water rights. The acceptance and development of the appropriation doctrine rather than the riparian doctrine was due to first, the climate and the particular type of frontier settlement (mining and ranching) which occurred in Montana and secondly, the fact that most of the land was in public domain.

This doctrine was recognized in the first water-right decision of the Montana Supreme Court in 1896.[1/] However, three years later Chief Justice Decius S. Wade championed the older doctrine [2/] and it was not until 1921 that the Court in **Mettler v. Ames Realty Co.** formally abrogated the riparian doctrine and declared the appropriation doctrine to be the sole surface water law of the State.[3/]

Ownership

No person owns water in Montana. Rather, the state has ownership of water by virtue of the state constitution[4/] (which holds that the use of water is a public use) and by the opinion of the Montana Supreme Court.[5/] An individual has (owns) the right to use the water as long as he does not infringe on rights of prior appropriators.

Acquisition of Water Rights

The principal method of acquiring a water right in Montana is by appropriation. The nature of the appropriation procedure differs for adjudicated and unadjudicated streams.

Appropriation from Adjudicated Streams

The revised Codes of Montana (R.C.M.) 1947, Title 89-829 through 838, spells out the procedure for appropriation of water from adjudicated streams. An appropriator shall:

1. Employ a competent engineer to survey the area and means of conducting water from its source to place of intended use.
2. Have aerial photographs and drawings thereon to show the course of the intended diversion or location of intended impoundment.
3. File with the Clerk of the Court in the county of appropriation a petition which includes:
   a. the amount of water sought by appropriation,
   b. a description of the watercourse or body from which water is intended to be appropriated,
   c. a description of the means of diversion or size, location, and manner of construction if a reservoir is intended,
   d. the engineers survey and aerial photographs,
   e. a declaration by the appropriator that the rights sought shall be subject to and bound by any decree theretofore rendered adjudicating the waters or any body to which the waters may be tributary.
4. Name all others who have or appear to have rights in the source of supply as defendants in the appropriation proceeding.

1/ Caruthers v. Pemberton, 1 Mont. 111-117 (1869)
2/ Thorp v. Freed, 1 Mont. 651-87 (1872)
3/ Mettler v. Ames Realty Co., 61 Mont. 152-171, 201 Pac. 702-708 (1921)
4/ Mont. Const. art. III, Sect. 15.
5/ Galahan V. Lewis, 105 Mont. 294, 300, 72 P 2d 1018 (1937)

When this procedure is completed, a trial follows which normally results in a decree. The court sholl in every case, if an appropriation is awarded to the plaintiff, provide that the new appropriation is subject to all adjudicated rights which are prior in time to plaintiff's right, and the plaintiff shall be bound by the terms of any prior decrees with respect to water rights in the proper order of his priority as if he had been a party to the decree originally.[6/]

Appropriation from Unadjudicated Streams

The appropriation of water from an unadjudicated stream in Montana is similar to the procedure for adjudicated streams but **does not require litigation.** The procedure requires:[7/]

1. Posting of notice in a conspicuous place at the point of intended diversion, stating:
   a. quantity of water claimed,
   b. use for which water is claimed and place of use,
   c. description of means of diversion,
   d. date of appropriation,
   e. name of appropriator.
2. Filing, within 20 days after date of appropriation, of a notice of appropriation with the county clerk, including in addition to the posted notice:
   a. name and description of the stream,
   b. description of point of diversion with reference to a permanent monument or natural marker and,
   c. verification by affidavit of the appropriator that facts of the notice are true.

Size of Water Right

A point often misunderstood concerning water rights is that the amount of water claimed in an appropriation is not necessarily the amount to which the appropriator has a right. **THE AMOUNT OF WATER BENEFICIALLY USED DETERMINES THE SIZE OF THE RIGHT.** In this respect the court has said:

> "The rights of appropriators of water may not be measured entirely by what they claimed in their notices of appropriation, but must be measured by their beneficial use thereof over reasonable periods; . . ."[8/]

Loss of Water Right

A water right in Montana may be lost in two ways, abandonment and adverse use. Both are questions of fact and are determined as such.

Abandonment

Abandonment of a water right is a voluntary act, and to constitute it there must be a concurrence of act and intent—the relinquishment of possession and the intent not to resume it for a beneficial use—neither alone being sufficient to bring about its abandonment.[9/]

Adverse Use

Adverse use or prescription is the open, notorious, exclusive, adverse, continuous and uninterrupted use of water by a party other than the party entitled to the water. In order to acquire a water right by adverse use or prescription the proof must show all the following elements: That the use has been continuous for five years, exclusive, open, under a claim of right, hostile, and an invasion of another's rights which the latter had an opportunity to prevent.[10/]

Use of water with permission negates the possibility of adverse use.

The claim of adverse use of a water right cannot be established until the owner of the superior right is deprived of the benefit of its use in such a substantial manner as to notify him that his rights are being invaded; mere use of the water during the statutory period alone is not sufficient, but it must appear that during such entire period an action could have been maintained against the claimant by the owner of the right.[11/]

Official Measurement of Water

The legal standard for the measurement of water in Montana is the cubic foot per second of time.[12/]

6/ 89-832, RCM, 1947
7/ 89-810, RCM, 1947
8/ Irion v. Hyde, 107 Mont. 84, at 95, 81 Pac., 2d, 353, (1938)
9/ Thomas v. Bull 66 Mont. 161, at 166, 213 Pac. 597. See also Osnes Livestock Co. v. Warren, 103 Mont. 284, at 294, 62 Pac. 2d, 206.
10/ Op. Cit. Irion v. Hyde
11/ Ibid.,
12/ 89-817, R.C.M., 1947

A cubic foot of water per second equals 7.48 gallons per second. Since many water rights in the past were granted in miner's inches the law provides the following conversion or equivalent factors:[13/]

40 miner's inches=1 cubic foot per second
100 miner's inches=2½ cubic feet per second
200 miner's inches=5 cubic feet per second

Ground-Water Law

Montana's ground water code is administered by the Montana Water Resources Board. The principal provisions of this code, which have yet to be tested in court, are summarized below and published as Title 89 of the Revised Codes of Montana.

Right to use (89-2912)

The application of ground water to a beneficial use prior to January 1, 1962, is hereby recognized as a water right.

Rights to surface water where the date of appropriation precedes January 1, 1962, shall take priority over all prior or subsequent ground water rights.

Beneficial use shall be the extent and limit of the appropriative right.

Appropriative rights shall relate only to quantities of water for beneficial uses and not to water levels, means of use, or ease of withdrawal; and appropriative rights shall not apply to minimal household use.

Filing Notices of Appropriation and Completion (89-2913)

Notices of ground water appropriation and completion are to be filed by each appropriator with the county clerk and recorder of the county within which the appropriation is to be made on forms provided to the clerk by the Montana Water Resources Board.

Controlled Ground Water Areas (89-2914)

Designation or modification of an area of controlled ground water use may be proposed to the board by the board's director or by petition signed by at least twenty (20) or one-fourth (whichever is the lesser number) of the users of ground water in a ground water area wherein there is alleged to be factual data showing that:

1. withdrawals exceed recharge,
2. excessive withdrawals are likely to occur in the near future because of consistent and significant increases in withdrawals,
3. significant disputes regarding priority of rights, amount of water in use by appropriators, or priority of type of use are in progress within the ground water area.

NOTE: "Ground water area" is defined in the law (82-2911) as an area which, as nearly as known facts permit, may be designated so as to inclose a single and distinct body of ground water. Sub-areas may also be created within a larger groundwater area.

Following a proposal for a controlled ground water area, the board must hold hearings to consider evidence and information and after the hearings make written findings and an order as to the proposed controlled area.

Controlled Area Permit (89-2918)

A permit from the Montana Water Resources Board is required in order to appropriate ground water from a controlled area.

WATER DISTRICTS IN MONTANA

Montana law provides for five principal types of "districts" that may be established for the general purpose of studying, planning, and promoting the development and conservation of water and related land resources and providing flood control. These are (1) County water and sewer districts, (2) Drainage districts, (3) Irrigation districts, (4) State soil and water conservation districts, and (5) County and municipal flood control and conservation districts.

In addition to district organizations there are two "corporate" types of organizations which may be formed for water development in Montana. These are Water Users' Associations and Canal or Ditch Companies. Most irrigation development in Montana has been accomplished through these private types of development including individual efforts and irrigation districts. The Montana Water Resources Board develops and markets water through the Water Users' Association.

13/ 89-818, R.C.M., 1947

Finally, there has been considerable irrigation and water development in Montana by the U. S. Bureau of Reclamation and the Soil Conservation Service of the U. S. Department of Agriculture.

County Water and Sewer Districts

County water districts in Montana may be formed by any combination of counties or cities or portions of those political divisions, including unincorporated territory, having not less than 200 inhabitants. Petitions to form a county water district must be signed by 10 percent of the registered voters in the proposed district. Any district incorporated has the power to acquire, operate and maintain water rights, water and sewerworks and other rights useful or necessary for the storage, conservation, supply, and conveyance of water useful for purposes beneficial to the district. Incorporated districts may accept assistance from public and private sources, borrow money, incur bonded indebtedness, and levy taxes.

Drainage Districts

Drainage districts in Montana are formed for particular projects. Once created, they may be expanded. Drainage districts are under the jurisdiction of the judge of the district court who may create the drainage district and appoint the commissioners. Drainage districts may be created to (1) construct drains, ditches, levees, across the lands of others or to straighten, or otherwise alter any natural stream or watercourse not navigable, for the promotion of public health or welfare or (2) maintain and keep in repair such works previously constructed. Drainage districts have the power of taxation and they may assess lands that are benefitted from the district projects.

Irrigation Districts

Irrigation districts in Montana may be formed to cooperate with the United States under federal reclamation laws for the purposes of constructing irrigation works (including drainage) and purchasing, extending, and maintaining constructed works. Sixty (60) percent of the landholders whose land is susceptible to irrigation from the district and whose title or evidence of title constitutes sixty (60) percent of said land must petition for a district to the district court. A copy of the petition and all other associated maps and papers filed must also be filed with the Montana Water Resources Board. At the time of filing in the district court, the board must present reports on (1) engineering features involved, (2) possibilities for water supplies, and (3) a copy of the decree of the district court showing any adjudicated water rights involved.

State Soil and Water Conservation Districts

Any ten (10) occupiers of land lying within the limits of the area proposed to become a district may petition the State Soil Conservation Committee to form a district. A soil and water conservation district is a body corporate and politic governed by five supervisors appropriately elected if there are no incorporated municipalities within the district. In all cases where the boundaries of such soil and water conservation district includes any incorporated municipality or municipalities, said board of supervisors, in addition to said five (5) elected supervisors, shall consist of two (2) appointed supervisors, making a total of seven (7) supervisors in such districts. The districts are coordinated through the State Soil Conservation Committee.

Examples of the activities and reasons why these districts are formed are (1) to develop comprehensive district plans for soil and water conservation; (2) flood control; (3) to undertake demonstration projects; (4) to construct, improve, and operate structures as may be necessary for authorized operations; and (5) to conduct research on soil erosion, floods, and sedimentation.

County and Municipal Flood Control and Conservation Districts

Montana law (Ch. 33 of Title 89)[14/] provides that cities, towns, or counties through their governing bodies may individually or jointly engage or participate in the establishment of water conservation and flood control projects, among themselves or with the State or Federal government. A wide variety of purposes may be objectives of such projects including but not limited to flood control, municipal and industrial water supplies, irrigation, recreation and wildlife, domestic use, drainage, and streamflow stabilization, and pollution abatement. The law explicitly contemplates that the State or Federal government may assume the actual direction and doing of the work on these projects.

14/ 89-3301-3313, R.C.M., 1947

WEATHER MODIFICATION

Attempts to change or control weather by artificial methods in Montana are regulated by the Montana Water Resources Board. Basic elements of the weather modification program as stipulated in Montana are as follows:

1. License and Permit Required:

   No one may engage in weather modification activity in Montana except under and in accordance with a license and permit issued by the Water Resources Board.

2. Exemption from Fee Requirement:

   The Board may provide by rule to exempt from license and permit fees weather modification activity of certain types and under certain conditions including:

   a. state and federal research, including colleges and universities.

   b. emergency operations against fire, frost, sleet, or fog.

3. Licensee Qualifications:

   The Board may, by rule, set the procedure and conditions for issuing a license to an applicant. However, applicants must demonstrate competence in the field of meteorology to the satisfaction of the Board. If the applicant is an organization, the requirements must be met by the individual in charge of the operation.

4. Terms of License and Fee:

   a. A weather modification license expires at the end of the calendar year of its issue.

   b. A fee of one hundred dollars ($100) shall be charged for a weather modification license.

5. Requirements for Permits:

   Permits shall be issued in accordance with procedures and subject to conditions the Board may establish only:

   a. if the applicant is licensed pursuant to this act;

   b. if sufficient notice of intention and proof of publication is filed;

   c. if applicant furnishes proof of financial responsibility in an amount determined by the Board;

   d. if the permit is paid;

   e if the Board has determined that the weather modification activity is for the general welfare and public good;

   f. if the Board has held an open public hearing in the area to be affected as to such issuance.

6. Separate Permit for Each Operation:

   A separate permit is required for each weather modification operation. An operation is defined as the activity producing or attempting to produce a certain modifying effect within one geographical area over one continuing time interval not exceeding one year.

7. Permit Fee:

   The fee for a weather modification permit shall be one and one-half (1½) percent of the estimated cost of the operation.

COMPACTS AND TREATIES

Waterways Treaty — 1909

According to the Waterways Treaty, signed in 1909, by the United States and Great Britain, the water of the St. Mary and Milk Rivers and the international tributaries of the Milk River are to be divided equally between the United States (Montana) and Canada. In making such equal apportionment, however, more than half of the water may be taken from one river and less than half from the other by either country so as to afford a more beneficial use of each. During the irrigation season, the United States is entitled to a prior appropriation of three-fourths of the natural flow of the Milk River and Canada is entitled to three-fourths of the natural flow of the St. Mary River. The principal international tributaries affecting Montana are Sage Creek (North of Havre), Lodge and Battle Creeks (North of Chinook), and Frenchman Creek (North of Saco).

Yellowstone Compact — 1950

The states of Montana, North Dakota, and Wyoming are members of the Yellowstone River Compact, ratified in December, 1950. This compact provides the means for the allocation and appropriation of water from the Yellowstone River System. The principal terms and provisions of the compact are specified as follows:

1. The compact is administered by a commission consisting of one representative from Montana, Wyoming, and the U. S. Geological Survey.

2. The area of the Yellowstone Basin within Yellowstone National Park is exempt from the provisions of the compact.

3. Water rights on the Yellowstone River and its tributaries which were perfected prior to 1950 are considered vested and are not subject to the terms of the compact.

4. No water shall be diverted outside the Yellowstone Basin without uananimous consent of the signatory states.

5. Concerning Montana and Wyoming, the unused and unappropriated waters as of January 1, 1950, in the major interstate Yellowstone River tributaries are to be apportioned as follows:

Clarks Fork of the Yellowstone

To Wyoming 60%
To Montana 40%

Big Horn River (excluding the Little Big Horn)

Tc Wyoming 80%
To Montana 20%

Tongue River

To Wyoming 40%
To Montana 60%

Powder River (including the Little Powder River)

To Wyoming 42%
To Montana 58%

The Columbia River Treaty of 1961 and the Protocol of January 1964

Salient features of the Treaty can be briefly summarized as follows:

1. Canada to provide 15,500,000 acre-feet of storage by constructing dams at Mica Creek, Lower Arrow Lake and Duncan Lake.

2. Canada to operate the amounts of storage for flood control purposes in accordance with principles set forth in the Treaty, for a period of 60 years. Canada to be paid $64,000,000 in U. S. funds by the United States for flood control benefits on commencement of respective storage operations.

3. Canada to operate the amounts of storage in accordance with assured plans of operation designed to produce downstream power benefits in the United States.

4. Canada to be entitled to one-half of the downstream power benefits, that is, additional power generated in the United States as a result of river regulation by upstream storage in Canada. Portions of the Canadian entitlement may be sold in the United States.

5. The United States to have the option of commencing construction of Libby storage dam.

6. Canada to have the option of making various diversions of the Kootenai River during the life of the Treaty.

The Protocol which was agreed to amplified and clarified the Columbia Treaty. A number of improvements were effected among which the following may be listed:

a. Reaffirmation in positive terms of Canada's right to make any diversions of Columbia Basin water required for consumptive needs such as irrigation and municipal uses.

b. Clarification of Canada's right to continue in perpetuity any diversion of Kootenai River water undertaken in accordance with the Treaty.

c. Confirmation of Canadian control over the detailed operation of the Canadian Treaty storage for power purposes.

d. A clear statement that the Treaty does not establish any precedents that apply to any waters other than those of the Columbia River and does not modify the application of the Boundary Waters Treaty to such other waters.

WATER POLLUTION

Under the supervision of the State Water Pollution Control Council, the State Department of Health is responsible for administering the water pollution laws of the state. The Department of Health has supervision over all state waters which are directly or indirectly being used as a public water supply. However, it is the Water Pollution Control Council which is responsible for establishing and modifying the classification of water in accordance with present and future beneficial uses. The Council is also responsible for formulating a program for pollution abatement.

NUMBERS FREQUENTLY CALLED

Name	Phone